LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
MAR 24 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 875

EDGAR W. STOKES,

Petitioner,

vs.

THE TRAVELERS INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Neal P. Rutledge
Counsel for Petitioner
835 duPont Building
Miami 32, Florida

INDEX

	Page
Opinions Below	1-2
Jurisdiction	2
Questions Presented	2-3
Statement	3-9
Reasons for Granting the Writ	9-13
Conclusion	13
Certificate of Service	14
Appendix A (Opinion and Judgment Below)	15-18
Appendix B (Opinion in companion case Below)	19-23

AUTHORITIES CITED

Case	Page
Columbian Nat. Life Ins. Co. v. Lanigan (1944), 154 Fla. 760, 19 So. 2d 67	12
Equitable Life Assur. Soc. v. McRee (1918), 75 Fla. 257, 78 So. 22	12
Jones v. General Accident, Fire & Life Assur. Corp., 118 Fla. 648, 159 So. 804	13
Mutual Gen. Health and Accident Ass'n. v. Weber, 299 Ky. 846, 187 S. W. 2d 273	13
National Life and Accident Ins. Co. v. Cox, 174 Ky. 683, 192 S. W. 636	12
Pace v. Pace (1882), 19 Fla. 438	12
Provident Life and Accident Ins. Co. v. Watkins, 256 Ky. 645, 76 S. W. 2d 889	12
Soverign Camp W.W. v. Mixon (1920), 79 Fla. 420, 84 So. 171	12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No.————

EDGAR W. STOKES,

Petitioner,

vs.

THE TRAVELERS INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-styled cause on November 8, 1957.

CITATIONS TO OPINIONS BELOW

The United States District Court in and for the Southern District of Florida, Miami Division, rendered no opinion in this cause. Its Findings of Facts and Conclusions of Law and its Final Judgment appear in the

printed transcript of record (nine copies of which are submitted herewith) at pages R. 7-11. The opinion of the United States Court of Appeals, Fifth Circuit, is printed in Appendix A hereto, infra, pp. 15-18, and is reported in 249 F. 2d 155. The opinion in the companion case hereto of **Continental Casualty Co. v. Stokes**, 249 F. 2d 152, is printed in Appendix B, infra, pp. ~~21-25.~~ 19-23.

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on November 8, 1957 (R. 24; p. 18, infra). A timely petition for rehearing was filed November 29, 1957 (R. 25), and rehearing was denied December 24, 1957 (R. 27). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Question One

Where two cases are consolidated for trial before a United States District Judge, without a jury, and where both cases are tried on exactly the same evidence, is it reversible error for the Trial Judge to make inconsistent findings of fact in the two consolidated cases?

Question Two

Whether the Court of Appeals misapplied Florida law in ruling that an insurance policy which provides indemnity for total disability "resulting directly and independently of all other causes from bodily injuries" effected solely through accidental means does not apply when an insured is rendered totally and permanently dis-

abled in a severe automobile accident by a brain concussion which either activates or aggravates a pre-existing psycho-neurotic tendency.

STATEMENT

[Note: See footnote explanation below concerning record references contained in this Petition.][1]

This suit was originally brought in the Florida Circuit Court, Dade County, Florida, by petitioner seeking a declaratory decree as to petitioner's right to benefits under an accident insurance policy issued by respondent (R. 4-6). The case was removed by respondent to the United States District Court for the Southern District of Florida whose jurisdiction was invoked because of diversity of citizenship, the petitioner being a citizen of Florida and respondent being a citizen of Connecticut (R. 1-3).

In the District Court trial of this cause was consolidated with the trial of a companion case, Stokes v. Con-

---

[1]Due to the consolidation of this case with a companion case in the District Court below, the complete printed record in this case appears in both the printed transcripts of record of Court of Appeals Case No. 16,472, Edgar W. Stokes v. The Travelers Insurance Co., and of Court of Appeals Case No. 16,453, Continental Casualty Co. v. Edgar W. Stokes (R. 11). Accordingly, certified copies of both printed transcripts of record (together with nine additional copies of each) have been filed herewith. References to the transcript of record in case No. 16,472 will be designated by the letter "R" and references to the transcript of record in case No. 16,453 by the letter "T". Likewise, since the insurance policy here involved does not appear in either transcript of record, but was forwarded to the Court of Appeals as an original exhibit, the original exhibit has also been forwarded to this Court under the certificate of the Clerk of the Court of Appeals and by order of United States Circuit Judge Tuttle.

tinental Casualty Co., and both cases were tried before the District Judge without a jury on precisely the same evidence (T. 19).

The issue in the companion (or Continental Casualty Co.) case concerned whether or not petitioner was disabled by either accidental injury or by sickness so as to suffer a total loss of business time within the coverage of an accident and health insurance policy. The District Judge found that petitioner was totally and permanently disabled "at all times *since February 26, 1952*, and possibly for some time prior thereto" (emphasis added) by reason of sickness and awarded petitioner judgment against the Continental Casualty Company (T. 12-17). This judgment was affirmed by the Court of Appeals, Fifth Circuit, at 249 F. 2d 152.

In the instant case, the issue was whether or not petitioner was wholly and continuously disabled solely and exclusively as a result of bodily injuries sustained in an automobile accident occurring *on February 26, 1952*. (See Policy exhibit; see also pleadings, R. 4-7.) The District Judge found in this case that petitioner's disabilities definitely existed prior to the automobile accident on February 26, 1952, and were merely aggravated by the accident, if affected at all by it, and rendered judgment in favor of respondent (R. 7-11). This judgment was likewise affirmed by the Court of Appeals, and it is this decision which is here sought to be reviewed.

The evidence in the case consisted in part of the policy of insurance which provided for the payment of a weekly indemnity of Fifty Dollars if the insured became wholly and continuously disabled resulting directly and inde-

pendently of all other causes from bodily injuries sustained during the term of the policy and effected solely through accidental means. (See original exhibit of policy forwarded to this Court.) Other evidence consisted of the testimony of nine physicians and of Dr. and Mrs. Stokes, as follows:

Dr. Stokes: Dr. Stokes testified that he was a 58-year-old physician (T. 274-275); that he had operated a private psychiatric hospital in Louisville, Ky., most of his life (T. 274); that he had suffered from a heart condition and from essential hematuria prior to 1950 (T. 276); that in 1950 he sold his sanitarium and after winding up the sale and his affairs in 1951 came down to Florida to establish residence and to go into mental hygiene work (T. 275-277); that on February 26, 1952, while driving near Clewiston, Florida, to investigate an opening in that field, he had an automobile accident during a rain storm in which his automobile turned over three times and landed in a canal full of water (T. 277-278, 43); that he was bruised all over, knocked-out, and severely injured in the accident (R. 278-283, 43-45); that he was subsequently hospitalized for the accident (T. 282); and that ever since the accident he has been highly nervous, exhausted, subject to headaches, confused, hearing strange noises in his ears, and unable to work (T. 283, 47-49). It further appeared that the policy was in effect on the date of the accident and that the respondent had paid the weekly indemnity to petitioner for approximately six months following the accident (T. 37-40).

Mrs. Stokes: Mrs. Stokes testified concerning Dr. Stokes' strange and unbalanced behavior since the acci-

dent (T. 304-306), and that he has been unable to work or tend to his affairs since the accident (T. 305-306).

Dr. Keedy: Dr. Keedy, a neurosurgeon and specialist in diseases and injuries of the brain (T. 311), testified that he had observed and treated petitioner every six to eight weeks over a three-year period prior to trial and since the accident (T. 313); that Dr. Stokes was not feigning or trying to exaggerate his disabilities (T. 318); that he was suffering from a post concussion syndrome which was manifested by mild headache, forgetfulness, difficulty in concentration, and irritability (T. 316); that the concussion and the psychic trauma he received in the automobile accident of February 26, 1952, markedly aggravated a pre-existing psychoneurotic tendency which Dr. Stokes had (T. 318-319); that Dr. Stokes is occupationally completely disabled (T. 322); that such disability existed *certainly* from the time of the accident (T. 324); and that the complete disability is caused by Dr. Stokes' basic psychoneurotic tendency, together with the concussion and post concussion syndrome which aggravated such tendency (T. 328-329).

Dr. Strickler: Dr. Strickler, an eminent traumatic surgeon (T. 132), testified that in his opinion petitioner had sustained a severe concussion in his automobile accident of February 26, 1952 (T. 136); that he had suffered permanent, incurable, brain damage from this concussion (T. 138-140); that he is disabled thereby from practicing medicine (T. 139-140) or from doing any work at all (T. 154); and that such disability was sustained as a result of the automobile accident (T. 150). In addition, Dr. Strickler expressed his opinion that petitioner was not feigning or exaggerating his disability (T. 146).

Dr. Ledrew: Dr. Ledrew, a psychiatrist, testified that he had examined Dr. Stokes on behalf of the Continental Casualty Company on October 21, 1953, and had concluded then that Dr. Stokes was unable to work at that time (T. 268-269).

Dr. Taylor: Dr. Taylor, the general surgeon who treated petitioner in the hospital following the automobile accident (T. 228), testified that as a result of the accident petitioner was bruised all over, particularly the head, the arms, the lower trunk and the thighs, shin, and heel, and that he was pretty black and blue all over and swollen (T. 228); that he had suffered a head injury causing the left forehead to be discolored, bruised, swollen and abrased (T. 229) and a brain concussion (T. 230); that Dr. Stokes did not progress satisfactorily toward recovery and was not getting well (T. 236); and that Dr. Stokes is permanently disabled to practice medicine (T. 239-240).

Dr. Dornberger: Dr. Dornberger, an internist (T. 185), treated Dr. Stokes for a mild heart attack in 1954 (T. 187, 189, 190-191). He testified that Dr. Stokes is totally disabled (T. 203, 205); that the disability stems from Dr. Stokes' anxiety and mental condition (T. 212-213); that Dr. Stokes' heart condition in itself was not disabling, but that the disability derived from his residual symptoms from his auto accident and head injury (T. 207); and that Dr. Stokes needs psychiatric help (T. 213).

Dr. Troutman: Dr. Troutman, a heart specialist, testified that he examined Dr. Stokes in October, 1954, and that he did not demonstrate at that time any coronary disease (T. 158, 163-164).

Dr. Stewart: Dr. Stewart, a heart specialist, testified that he examined certain electrocardiograms of Dr. Stokes and that these gave no definitive evidence of heart disease (T. 354).

Dr. Atherton: Dr. Atherton, a urologist (T. 102), testified that he examined Dr. Stokes in December, 1952, for the Equitable Life Insurance Company (T. 103); found no organic pathology or physical impairment (T. 103); that Dr. Stokes was more nervous and highstrung than usual (T. 104-105); and that in his opinion Dr. Stokes was not totally and permanently disabled (T. 105, 119).

Dr. Strain: Dr. Strain, a neuro-surgeon (T. 338), testified that the results of a neurological examination of Dr. Stokes were within normal limits insofar as his actual motor functions from a neurological standpoint were concerned (T. 342-343). He further testified that in his opinion that the headaches Dr. Stokes complained of were produced by the trauma of the accident (T. 342).

On the basis of the foregoing evidence, the District Judge found in the case of **Stokes vs. Continental Casualty Co.** that Dr. Stokes is totally and permanently disabled and that such disability had lasted *at all times since February 26, 1952, the date of the accident, and* only *possibly* had existed prior thereto (T. 14-15). However, in the instant case, the same District Judge on exactly the same evidence, found that Dr. Stokes' disabilities definitely existed *prior* to the automobile accident and, if affected at all by the accident, were merely aggravated (R. 9). The Court further ruled that under the policy here involved, petitioner was not entitled to recover if his disability was aggravated by the automobile accident (R. 8).

Accordingly, the District Court entered judgment in favor of petitioner against the Continental Casualty Company in the companion case and judgment against petitioner in the instant case. The Court of Appeals affirmed both judgments. 249 F. 2d 152 and 249 F. 2d 155.

REASONS FOR GRANTING WRIT

Question One

Petitioner submits that the District Court here clearly has made inconsistent findings of fact in two cases which were consolidated and tried together on precisely the same evidence. In the **Continental Casualty** case, the District Judge found petitioner totally disabled from the time of the accident on—or, in other words, that the accident itself necessarily was the event which caused or started the total disability. In the instant case, however, the District Court made exactly the opposite finding—i.e., that petitioner's disabilities existed prior to the accident and if affected at all, were only aggravated.

In each case the District Court was dealing with the same man, the same accident, the same disability, and the same evidence. It is respectfully submitted that to permit a trial Judge, in such a situation, to make such inconsistent findings arbitrarily is to reduce the judicial process of fact-finding to the level of Alice-in-Wonderland nonsense, where black becomes white simply by virtue of being called white.

Petitioner's total disability either began on February 26, 1952, when he had his automobile accident, or it did not. To permit a Federal District Judge to find both

ways on this question *on the same evidence* is to admit that the goal of the judicial process is not the discovery of truth.

This is not the situation, of course, where two different fact-finders reach different conclusions from the same evidence, which is readily understandable as reasonable men may well draw different inferences or give different weight to the same evidence. Here, however, a single fact-finder in his capacity as a Federal Judge is permitted on identical evidence to find a particular fact is true in one case, and not true in a companion, consolidated case. This can only be the result of an arbitrary exercise of sheer power to find facts irregardless of the evidence.

Petitioner respectfully submits that the question of the District Court's power to make inconsistent findings in consolidated cases tried on the same evidence is one of importance to the whole Federal judicial system and should appropriately be settled by this Court.

Question Two

There is no evidence in this case that petitioner was totally disabled *prior* to the automobile accident on February 26, 1952. The only evidence concerning the origin of petitioner's disability comes from: (1) petitioner himself, who testified he was able to work and was making himself available for employment for which he was prepared at the time of the accident, and that he was unable to work after the accident; (2) Dr. Strickler, who testified the disability was caused by a severe concussion received in the automobile accident of February 26, 1952

which concussion had caused permanent and incurable brain damage; and (3) Dr. Keedy, who testified that the disability was caused by a basic psychoneurotic tendency which was aggravated or activated by the brain concussion received in the automobile accident, and that he could only say with certainty that the disability had existed since the accident. No insurance company witness or other witness testified as to the cause or origin of Dr. Stokes' disability.

Petitioner respectfully submits that taking the above described evidence in a light most favorable to respondent, it nevertheless conclusively appears that petitioner's total disability is either the direct result of brain damage received in the automobile accident of February 26, 1952, or is the direct result of the aggravation or activation of a pre-existing psychoneurotic tendency caused by a brain concussion and head injuries received in the automobile accident.

In either event, under the law of Florida, petitioner should be entitled to recover under an accident policy such as the one here involved. But the District Court and the Court of Appeals erroneously concluded that if the total disability was merely the result of the aggravation of a pre-existing condition, then no recovery could be had under the policy. In so construing the insurance contract here involved, it is respectfully submitted that the Courts below decided an important question of Florida law in conflict with applicable decisions of the Florida Supreme Court, and that accordingly, this petition should be granted. See Rule 19(b), Rules of Supreme Court of the United States.

The conflict between the Courts below and applicable

Florida law appears, first of all, in the failure of the District Judge and the Court of Appeals to apply Kentucky law to the insurance contract here involved since the contract had originally been issued and came into effect in Kentucky, where petitioner then resided, and itself makes numerous references to the law of the insured's residence at the time of issuance as controlling. (See original exhibit of insurance policy.) Under such circumstances, a Florida court would apply Kentucky law to the contract. **Pace v. Pace** (1882), 19 Fla. 438; **Sovereign Camp W. W. v. Mixon** (1920), 79 Fla. 420, 84 So. 171; **Equitable Life Assur. Soc. v. McRee** (1918), 75 Fla. 257, 78 So. 22; **Columbian Nat. Life Ins. Co. v. Lanigan** (1944), 154 Fla. 760, 19 So. 2d 67.

Under Kentucky law, it is likewise clear that an accident policy such as the one here involved does apply and cover the situation where accidental bodily injuries activate or aggravate a mental condition which in turn causes disability or death. Thus, in **Provident Life and Accident Ins. Co. v. Watkins**, 256 Ky. 645, 76 S. W. 2d 889, the Kentucky Court held that an accident policy in all respects similar to the instant one did apply to an insured who suffered an accidental head injury, as a result of which he developed mental aberrations and psychosis, as a result of which he became insane, as a result of which he refused to eat and therefore starved to death. The Court expressly over-ruled the insurance company's contention that the death was not, in such a case, caused solely and independently of all other causes by an external violent accident, but was partly by disease. See also **National Life and Accident Ins. Co. v. Cox**, 174 Ky. 683, 192 S. W. 636, where a death caused by pneumonia activated by the trauma of falling down stairs was covered by an accident

policy such as is here involved. As stated by the Kentucky Court in **Mutual Gen. Health and Accident Ass'n v. Weber**, 299 Ky., 846, 187 S. W. 2d 273, the fact that an insured may have some disabilities prior to an accident does not relieve an accident insurer from all liability for death or disability caused by the accident. Accident policies are not intended to be restricted only to an Apollo or Hercules.

Indeed, the Florida law itself on the subject is in complete harmony with Kentucky law. Thus, in **Jones v. General Accident, Fire & Life Assur. Corp.**, 118 Fla. 648, 159 So. 804, the Florida Supreme Court held that an insurer against effects resulting directly and exclusively from bodily injury sustained solely through external, violent, and accidental means is liable where bodily injury directly caused a dormant disease, not then progressively tending to cause death, to become progressively active whereby death of insured resulted, although bodily injury would not have caused death of insured had he not had the dormant disease.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

Neal P. Rutledge
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit was mailed this 21 day of March, A. D. 1958 to: **James A. Dixon, Jr., Dixon, DeJarnette, Bradford & Williams, Ainsley Building, Miami 32, Florida, counsel for respondent.**

Neal P. Rutledge

APPENDIX A

The opinion and judgment below are as follows:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16472

EDGAR W. STOKES,

Appellant,

versus

THE TRAVELERS INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 8, 1957)

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

PER CURIAM: This case is a companion to Stokes v. Continental Assurance Company, 5 Cir., 242 F. 2d 893, and to Conttinental Casualty Company v. Stokes, 5 Cir., 249 F. 2d 152. The three cases originate from Stokes's efforts, after an alleged automobile accident on February 26, 1952, to recover benefits under health and disability policies held by him. In Stokes v. Continental Assurance Co., supra, we affirmed a judgement entered upon a jury verdict for the defendant insurance com-

pany. In Continental Casualty Company v. Stokes, supra, which was consolidated for trial with the present proceeding, but which has been considered as a separate appeal, we affirmed a judgment in favor of the plaintiff Stokes entered by the trial judge sitting without a jury. In the present case, Stokes appeals from a judgment, similarly entered by the trial judge alone, in favor of the defendant Travelers Insurance Company. The main question is whether the trial judge's findings are supparted by the evidence.

By stipulation of the parties this case is to be decided on the testimonial evidence in the record in the Continental Casualty case. The requirements of the Travelers policy, however, are different from those upon which recovery depended in the Continental Casualty case. There, as in the Continental Assurance case, the question was whether the insured had become disabled by bodily or accidental injury, *or* by sickness, and had suffered a loss of business time thereby. The Travelers policy, on the other hand provides for indemnification " . . . against loss resulting directly and independently of all other causes from bodily injuries sustained during the term of this Policy and effected solely through accidental means, subject to the provisions, conditions and limitations contained in this Policy."

The trial judge found as a fact:

" . . . 4. That the defendant, The Travelers Insurance Company, is liable to the plaintiff, Edgar W. Stokes, only if the plaintiff is permanently and totally disabled from injuries brought about solely by the aforesaid automoble acci-

dent within the meaning of the provisions of said policy, and that the said defendant is not liable to the plaintiff for disasbilities, if any, arising independent of his injuries in the aforesaid accident, or disabilities, if any, which were aggravated by the aforesaid accident.

"5 That the disabilities of the plaintiff from September 10, 1952 to the present time, and under which he is laboring at the present time, are conditions which existed prior to the aforesaid automobile accident, and if affected at all by the said accident were merely aggravated, and that his present disabilities were not brought about solely by the said accident within the meaning of the provisions of the defendant's policy of insurance, or, in the case of the plaintiff's claimed heart condition, if any, were unconnected with the aforesaid automobile accident or any other accidental occurrence within the coverage afforded by the aforesaid policy of insurance."

Without, therefore, reaching the question whether the plaintiff was totally and permanently disabled within the meaning of the policy, the trial judge determined that the plaintiff was not entitled to recover under the policy.

We are in agreement with the trial court in its interpretation of the policy of insurance as it must be applied to the facts of this case. We have carefully examined the evidence and find that it amply sustains the finding that the plaintiff's disability was not solely due

to the automobile accident. It cannot be said that the finding is clearly erroneous (Rule 52 (a), Fed. Rules Civ. Proc. 28 U.S.C.A.)

The judgement is affiremed.

JUDGMENT.

Extract from the Minutes of November 8, 1957.

EDGAR W. STOKES,

No. 16472. versus

THE TRAVELERS INSURANCE COMPANY

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered and adjudged that the appellant, Edgar W. Stokes, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX B

The opinion and judgment below are as follows:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16453

CONTINENTAL CASUALTY CO.,

Appellant,

versus

EDGAR WILLIAM STOKES,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 8, 1957)

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

PER CURIAM: Edgar W. Stokes, the plaintiff-appellee, brought this proceeding to obtain a declaration of his rights under a health and accident policy issued by the defendant-appellant, Continental Casualty. It is one of three cases in which Stokes has sought to recover benefits under health and disability policies held by him. In the companion case of Stokes v. Continental Assurance Company, 5 Cir., 242 F. 2d 893, we affirmed a judgment entered upon a jury verdict in favor of the defendant insurance company. The third case, Stokes v. Travelers

Insurance Company, 5 Cir., 249 F. 2d 155, which was consolidated for trial with the present proceeding, will be considered hereafter as a separate appeal.

This case and the Travelers case were tried upon the entire transcript of testimony and exhibits introduced in the Continental Assurance case, supra. In addition there were introduced certain depositions which had not been considered in the earlier trial, and the plaintiff Stokes testified anew in open court.

The plaintiff's policy provides for monthly payments to the insured, ". . . if [*he*] shall be disabled by accidental injury or by sickness and by reason of such disability shall necessarily suffer loss of business time . . .". The amount of the payments depends upon whether the loss of time is total or partial. The trial judge, sitting without a jury, found as a fact that since at least February 26, 1952, the insured ". . . has been totally and permanently disabled by reason of sickness within the meaning of said policy and has suffered a total loss of business time during the entire period."

The policy upon which the present action is brought is similar to the policy which we had for consideration in the Continental Assurance Company case. To a casual observer, it may appear inconsistent in view of these similar provisions that the defendant, the insurance company, should prevail in the jury trial in the reported case and that the plaintiff should be given a judgment in the present case. This apparent inconsistency is even more emphasized when it is considered that the trial court gave judgment for the defendant insurance company in the Travelers Insurance Company case.

The differing results in the three cases can be readily understood, however, when it is realized that this Court will affirm the judgment of a trial court based upon a jury verdict if there is any evidence to support it. It follows, of course, that if the jury had decided the case differently, the opposite verdict, if supported by evidence, would also be affirmed. In other words there may be complete inconsistency in fact between two findings either by two separate juries or by a jury on the one hand and a trial judge sitting wihout a jury on the other. Moreover, the apparent inconsistency is sometimes more imaginary than real when the testimony or other evidence before the trial court differs in some degree in the two different trials.

Without undertaking to analyze the testimony of all the witnesses as contained in the record of the first trial, or to point out specifically the additional testimony adduced both in open court and by deposition for consideration of the district court in the present case, we simply say that the record which is now before us contains evidence sufficient to support a finding of the trier of facts that Dr. Edgar W. Stokes had within the meaning of the policy suffered a total loss of business time and that such loss was permanent in nature.

We recognize of course that the requirements to be followed in the appellate review of findings of fact returned by a jury, mentioned previously in discussing the apparent inconsistency in the differing judgments in these cases, do not apply in the review under Rule 52(a), Fed. Rules Civ. Proc. 28 U.S.C.A. of findings rendered by a judge sitting without a jury and that evidence sufficient to support a jury verdict may not sustain a trial judge's

finding (See Orvis v. Higgins, 2 Cir., 180 F. 2d 537, certiorari denied 340 U.S. 810, 71 S.Ct. 37, 95 L.Ed. 595). It is also true, as we have observed (Galena Oaks Corporation v. Scofield, 5 Cir., 218 F. 2d 217), that the duty at this level to adhere to the trial court's findings as presumptively correct becomes less compelling as the ability of the appellate court to evaluate credibility and weigh evidence approaches that of the judge below, owing, for example, to the documentary or undisputed character of the proof. These considerations, however, neither require nor suggest reversal here.

The facts upon which the trial judge's finding rests are not undisputed. The plaintiff, in addition, testified in open court. Although the remaining proof is entirely documentary, it does not render thhe plaintiff's testimony immaterial to the decision of this case nor the trial judge's evalution of his credibility unimportant. Here, in fact, the opportunity to observe the plaintiff as a witness is peculiarly important, for his credibility not only influences the weight to be given to his own testimony in open court, but also affects to an appreciable degree the trustworthiness and persuasiveness of much of the documentary proof as well. The depositions and transcript of the earlier trial are devoted largely to medical evidence and are the only source of disinterested testimony upon the medical aspects of this case. The opinions favorable to plaintiff are derived primarily from his medical history as related by him and the dispute here, as it did in the Continental Assurance case, centers upon the authenticity of this history and the genuineness of the subjective symptoms plaintiff exhibited. The data upon which much of the expert testimony was based being singularly within the plaintiff's control, his credibility is

inevitably involved in assessing the appropriate weight to be given to that medical evidence. We cannot duplicate the opportunity of the trial judge to appraise that proof even though it reached him in documentary form, and we note that he acknowledged reliance upon the appearance and demeanor of the plaintiff upon the stand in evaluating the medical testimony. Under these circumstances, we are not persuaded, nor is there a predicate for holding that a mistake was committed below (see United States v. U. S. Gypsum Co., 333 U. S. 364, 68 S.Ct. 525, 92 L.Ed. 746).

The appellant's other points have been carefully examined but we find them to be without merit.

The judgment is affirmed.